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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 757

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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Moore's Federal Practice 2d Ed., Vol. 7, 331 18

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COMMERCIAL UNION ASSURANCE COMPANY, LTD., et al.,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

MAY IT PLEASE THE COURT:

Respondents aver that the only "question presented" by this petition for certiorari is:

"Do special and important reasons exist in this case within the meaning of Rule 19 of the Supreme Court Rules?"

Respondents aver that this question should be answered "No".

STATUTE AND RULES OF CIVIL PROCEDURE

In addition to the statutes and rule of Civil Procedure set forth in the petition for certiorari, respondents aver that the following Rules of Civil Procedure are involved:

Federal Rule of Civil Procedure 50(b) provides:

> "(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Federal Rule of Civil Procedure 59 provides:

> "Rule 59. *New Trials; Amendment of Judgments* (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of

the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter the judgment shall be served not later than 10 days after entry of the judgment."

STATEMENT OF THE CASE

Respondents accept the statement of the case of the petitioner with the following supplement:

The jury verdict was rendered May 18, 1962 (Append. 61b-64b). The clerk, pursuant to said verdict, made the following docket entry on May 25, 1962, to-wit:

"Proceedings

"5-25-62 Judgement hereby entered by oral order of the Court from the bench May 18, 1962, upon special jury verdict in favor of the plaintiff, Helen Corinne Scales Trice, executrix of the Will of Joe W. Scales, deceased, and against the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America; and the Home Insurance Company in the sum of $25,000.00 for damages to insured building items and in the sum of $20,000.00 for damages to insured machinery and equipment items. F. E. W., D. C.

"5-25-62 Judgment hereby entered by the Clerk on the general verdict of the jury May 18, 1962, in favor of the Insurance Company of North America and the United States Fidelity and Guaranty Company as Defendants, and in favor of the same parties as counter-claimants in the sum of $3,000.00 against the Plaintiff, Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased. F. E. W., D. C."

(Append. 2a)

On May 28, 1962, the tenth day after the jury verdict and the third day after the clerk's docket entry, the respondents filed their "Motion of Certain of the Defendants for an Order Setting Aside the Verdict and Judgment Against These Defendants and for Entry of Judgment in Accordance with These Defendants' Motion for a Directed Verdict and in the Alternative for a New Trial". (Append. 2b-12b).

Pursuant to the plaintiff's own motion to amend the original judgment of May 25th, which motion was filed June 4, 1962 (Append. 13a-14a), the Court asked counsel to submit a proposed order. Both counsel for the plaintiff and counsel for the defendants submitted proposed orders to the Court, together with briefs on the merits thereof. After consideration of the same the Court entered its order of July 23, 1962. (Append. 15a-22a). In said order the Court specifically approved the jury verdict in favor of the companies insuring grain items and, as to the buildings and machinery items, amended the judgment of May 25th "As of May 25th" allowing interest to plaintiff from the filing of suit and allowing credit to the defendants for payments to the mortgagees and taxing costs, but did not approve the jury verdict as to the buildings and machinery items.

Within ten (10) days after the entry of July 23rd "Order", defendants filed a motion under Rule 59(e) to amend said judgment by disallowing interest and in the same motion, out of an abundance of caution, renewed and reiterated their motion of May 28, 1962. (Append. 12b-13b).

On October 8, 1962, the Court overruled both the motion of the defendants to disallow interest to the plaintiff from the time suit was filed, and the motion of the plaintiff to vacate that portion of the judgment crediting the defendants with sums paid the mortgagees, but in said order specifically noted the continuing pendency of the defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial. (Append. 27a-29a).

Plaintiff, then on November 7, 1962, appealed from "that part of the judgment and order entered July 23,

1962" allowing the defendants credit for all payments to the mortgagees, and from "that part of the order entered on October 8, 1962, overruling the plaintiff's motion to alter said judgment entered on July 23, 1962", by which motion the plaintiff had sought to delete the provision crediting the defendants with mortgagee payments. (Append. 57a-58a).

On December 20, 1962, subsequent to the "Notice of Appeal" of the plaintiff filed November 7, 1962, the Court entered an order denying the plaintiff's motion for relief under Rule 60(b4) and pursuant to the defendants' motion of May 28 for judgment notwithstanding the verdict and in the alternative for a new trial, set aside the verdict of the jury insofar as the verdict found the plaintiff's testator, Joe W. Scales, did not burn his feed and seed mill or cause it to be burned and insofar as said verdict found that Scales was not guilty of fraud, false swearing or willful concealment or misrepresentation as against these defendants. Final judgment was reserved pending disposition of the questions raised by the counter-claims of these defendants wherein they sought to recover a statutory penalty from the plaintiff under Section 56-1106, Tennessee Code Annotated, for bringing suit in bad faith. (Append. 14b-15b). This order was accompanied by an extended memorandum which is a part of the record in this cause. (See 213 F. Supp. 675).

On January 19, 1963, plaintiff appealed from the December 20, 1962, order. (Append. 93a-94a).

On January 25, 1963, the Court entered a "Supplemental Memorandum and Order" disposing of all pending matters, expressly sustaining the defendants' motion filed May 28, 1962, for both judgment notwithstanding the verdict and for a new trial. (Append. 15b-16b) (See 213 F. Supp. 675).

Plaintiff's first appeal, that is the one filed November 7, 1962, was designated in the United States Court of Appeals in the Sixth Circuit as Docket No. 15285.

The plaintiff's second appeal, that is the one filed January 19, 1963, was assigned Docket No. 15286 in the Court of Appeals

The plaintiff's third appeal, which was taken from the final order of the trial Court entered January 25, 1963, was assigned Docket No. 15345.

On July 14, 1964, the United States Court of Appeals for the Sixth Circuit issued its decision reversing the action of the trial Court insofar as the judgment notwithstanding the verdict was concerned. The Court, however, affirmed the action of the trial Court in sustaining these defendants' motion for a new trial.

ARGUMENT

Section I—Do special and important reasons exist in this case within the meaning of Rule 19 of the Supreme Court rules?

Respondents aver that this question should be answered "No".

The jurisdiction of the Supreme Court on a writ of certiorari is necessarily restricted and may only be granted when there are "special and important reasons" therefor.

> "This rule, formulated thirty years ago, embodies the criteria developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Ap-

peals and more largely confined by the Judiciary Act of 1925....

"'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Rice v. *Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. ed. 897.

A writ of certiorari is governed by Rule 19 of the Supreme Court rules and "does not provide a normal appellate channel in any sense comparable to the writ of error."

Fay v. *Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837.

"The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine Circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co. v. *De Spoturno Coty*, 262 U. S. 159, 163, 164, 43 S. Ct. 531, 67 L. ed. 922, 924.

Tested by the above rules, respondents aver that the petition is insufficient. It seeks "merely to give the defeated party in the Circuit Court of Appeals another hearing."

Section II—Answers to petitioner's questions.

Question No. 1 asserted by the petition is whether or not appeal No. 15285 was a premature appeal and thus void.

It has long been settled that the United States Court of Appeals can only review a final judgment. This requirement of the Code has existed since the Judiciary Act of 1789.

1 Stat. 73.

Cobbledick v. *U. S.*, 309 U. S. 323, 84 L. ed. 783.

Catlin v. *U. S.*, 324 U. S. 229, 89 L. ed. 911.

The rule is well settled and of long standing that a judgment or decree to be final must terminate the litigation between the parties on the merits of the case so that, if there should be an affirmance here, the Court below would have nothing to do but execute the judgment or decree it had already rendered.

Bostwick v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73.

Baltimore & Ohio Railway Co. v. *United Fuel & Gas Co. et al.*, 154 F. 2d 545.

An order, judgment or decree which does not have this effect—one which leaves the rights of the parties to the suit undetermined and subject to further adjudication —is not a final decision.

Morgan v. *Thompson*, 124 F. 203.

Baltimore & Ohio Railway Co. v. *United Fuel & Gas Co. et al.*, 154 F. 2d 545.

Where a claim is incidental to and dependent upon the ultimate recovery in the principal claim by the same party and ultimate defeat of the principal claim would render the incidental and dependent claim moot, an appeal will not lie separately to an adverse ruling on the incidental and dependent claim but an appeal must await the ultimate decision on the principal claim.

Panichella v. *Pa. R. R. Co.*, 252 F. 2d 452.

Flegenheimer v. *Mantiboa Sugar Co., Ltd.*, 182 F. 2d 742.

Baltimore & Ohio Railway Co. v. *United Fuel & Gas Co. et al.*, 154 F. 2d 545.

It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; final not only as to all the parties, but as to the whole subject matter and as to all causes of action involved; and that if the judgment or decree be not thus final and complete the writ of error or appeal must be dismissed for want of jurisdiction.

Hohorst v. *Hamburg-American Packet Co.*, 148 U. S. 262, 37 L. ed. 443.

Collins v. *Miller*, 252 U. S. 364, 64 L. ed. 616.

Oneida Navigation Corp. v. *W & S Job & Co.*, 252 U. S. 521, 64 L. ed. 697.

United States for the Use and Benefit of David J. Mustin et al. v. *Alcon Development Corp.*, 271 F. 2d 901.

Tauzin v. *St. Paul Mercury Indemnity Co.*, 195 F. 2d 223.

In *Tauzin* v. *St. Paul Mercury Indemnity Co.*, 195 F. 2d 223, the Court of Appeals of the Fifth Circuit dismissed the appeal for want of jurisdiction, holding that the appeal was not perfected from a final decree. This was done even though the Court of Appeals determined in its opinion the District Court clearly erred in dismissing the complaint. The Court of Appeals reasoned that though the lower Court had dismissed the complaint as to one defendant, the case was still pending before the District Court as to a second defendant and thus the order of dismissal was not final and not appealable.

The finality of a judgment does not depend on its correctness but on whether it disposes of all the issues.

Phelan v. *Middle States Oil Corp.*, 210 F. 2d 360.

A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, pro-

vides with reasonable completeness for giving effect to the judgment and leaves nothing to be done in the cause save to superintend ministerially the execution of the decree.

Grand Trunk Western Railway Co. et al. v. *McHie,* C. A. 6th Circuit, 100 F. 2d 86.

Turnbull v. *United States of America,* C. A. 6th Circuit, 139 F. 2d 126.

City of Louisa v. *Levi,* 140 F. 2d 512.

A judgment cannot be final where it is impossible for the party in whose favor the decision is made to obtain any benefit therefrom without resetting the cause for hearing before the Court upon a reservation made in the judgment itself.

City of Louisa v. *Levi,* 140 F. 2d 512.

Nothing done by either party or even by both parties in concert can vest jurisdiction in the Court to review a case over which, under the controlling statute, jurisdiction does not exist.

State of Texas v. *Chuoke,* 154 F. 2d 1.

City of Louisa v. *Levi,* 140 F. 2d 512.

Royalty Service Corp. v. *City of Los Angeles,* 98 F. 2d 551.

Stevens v. *Turner,* 222 F. 2d 352.

Motions for new trial and for judgment notwithstanding the verdict operate to vest in the trial Judge continued control over the judgment and until disposed of the judgment does not become final for the purposes of review; and where the motion remains to be acted upon below there is lacking the final decision necessary to appellate jurisdiction.

Green v. *Reading Co.,* 180 F. 2d 149.

Piece meal appeals are not encouraged.

County Bank of Greenwood, South Carolina, v. *First National of Atlanta,* 184 F. 2d 152.

In *Taylor* v. *Board of Education, etc.*, 288 F. 2d 600, the United States Court of Appeals for the Second Circuit recited a detailed analysis of the historic application of the fundamental rule of finality as a condition to review in Federal appellate procedure.

By no stretch of the imagination could this appeal, No. 15285, be construed to be within the scope of Rule 54(b) so as to allow a severable appeal. That Rule provides a means of appeal from a portion of a judgment or a separable part of a case, but only upon two conditions, to-wit:

(1) Direction by the Court for the entry of a final judgment upon one or more, but less than all of the claims, and;

(2) upon an expressed determination by the Court that there is no just reason for delay.

Rule 54(b), Federal Rules Civil Procedure.

Beredict Aviation Corp. v. *Glass,* 195 F. 2d 267. See annotation 38 A.L.R. 2d 378.

The Court having made no determination in compliance with the conditions of Rule 54(b), the July 23, 1962, order is not appealable under Rule 54(b).

Sears-Roebuck v. *Mackey,* 351 U. S. 427, 76 S. Ct. 895, 100 L. ed. 1297.

Cold Metal Process Co. et al. v. *United Engineers Foundry Co.,* 351 U. S. 445, and Annotation thereto, 76 S. Ct. 904, 100 L. ed. 1311.

Phinney v. *Houston Oil Field Material Co.,* 252 F. 2d 357.

Thus, the July 23rd order was not appealable and any effort by the plaintiff to appeal that order was a nullity.

U. S. v. *Crescent Amusement Co.,* 323 U. S. 173, 65 S. Ct. 254, 89 L. ed. 160, Rehearing Denied 323 U. S. 818, 65 S. Ct. 437, 89 L. ed. 650.

U. S. v. *Martin,* 267 F. 2d 764.

The trial Court retained jurisdiction of the cause in spite of the void appeal, No. 15285, as a trial Court is not required to suspend its proceedings while a party proceeds or attempts to proceed with an improvident and untimely appeal.

Resnik v. *La Paz Guest Ranch*, 289 F. 2d 814.
Healy v. *Pa. Rwy. Co.*, 181 F. 2d 934, Cert. Denied 340 U. S. 935, 71 S. Ct. 490, 95 L. ed. 674.
Taylor v. *Board of Education*, 288 F. 2d 600.

Tested by the above well settled rules, the appeal in No. 15285 filed on November 7, 1962, was an absolute nullity If the May 25, 1962, docket entry of the Court was sufficient under Rule 79(a), then time for appeal under Rule 73(a), and/or time for filing amendatory motions sufficient to suspend the finality of the May 25th docket entry until determination of said motions, began to run from and after May 25, 1962. The motion of the respondents filed on May 28, 1962, was a combined motion under Rule 50(b) for judgment notwithstanding the verdict and for judgment in the alternative for a new trial. Such a procedure was clearly proper.

Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243, 85 L. ed. 147, 61 S. Ct. 189.

This motion as a matter of law suspended the entire cause for purposes of appeal until said motion was ruled upon by the Court.

Green v. *Reading Co.*, 180 F. 2d 149.

The same reasoning above is equally applicable to Appeal No. 15286 which purported to be perfected from the December 20, 1962, order of the Court. That order was expressly declared to be interlocutory by the Court and, thus, clearly not appealable.

Contrary to the statement in the petition, the judicial function in this case was not performed in an unusual way.

Analysis will indicate that on May 18, 1962, the jury returned its verdict. (Append. 61b-64b). It found fraud as to the grain claim and assessed a statutory penalty (Tennessee Code Annotated, Section 56-1106), against the petitioner in that the suit was brought in bad faith. The petitioner did not appeal from the grain judgment but instead promptly paid the $3,000.00 penalty. The jury verdict provided a recovery on building and machinery items in favor of the petitioner for $25,000.00 and $20,000.00, respectively, this in spite of the fact that the evidence disclosed conclusively that the proof of loss had inflated the size of the main storage vessel to nearly four (4) times its actual size. (Append. 32b-37b, 39b-40b, 60b). (Absent the inflated grain bin, the combined capacity of all storage facilities in the mill was inadequate to hold the amount of grain asserted in the proof of loss). (Pl. Ex. 2, Append. 32b-36b). Respondents promptly thereafter began the preparation of their motion under Rule 50(b) for judgment notwithstanding the verdict in view of the fact that the Rule provides that such motion must be filed within ten (10) days after the returning of the jury verdict.

On May 25, 1962, the Clerk, pursuant to Rule 79(a), noted the judgment on his docket. (Append. 2a). Respondents, deeming that this notation might well be adequate to constitute the judgment of the Court and that time for appeal and/or appropriate motions under Rule 59 might commence as a result of said docket entry, determined to combine the motion for judgment notwithstanding the verdict with the motion for a new trial and to file the combined motion within ten (10) days following the rendition of the jury verdict. This was done. (Append. 2b-12b).

Thereafter, on June 4, 1962, the petitioner moved the Court to amend the judgment to include interest from the date the suit was filed. (Append. 13a-14a). The Court

then instructed the Clerk to advise counsel on both sides to submit a proposed order according to the usual practice. Each side prepared and submitted such a judgment and a brief in support of the proposal. Thereafter, on July 23, 1962, the Court entered a formal and detailed order setting forth the procedural steps and the verdict of the jury, approving the judgment of fraud as to the grain claims, adding interest as requested by the petitioner, crediting the respondents with payments made to the mortgagee under the loss payable clause and amending the May 25th order "as of May 25, 1962" so as to accomplish the interest addition and mortgagee payment credit. (Append. 15a-22a).

No action was taken on the respondents' motion of May 28, 1962, previously filed. Unquestionably the May 28th motion was timely under Rule 50(b) as a motion for judgment notwithstanding the verdict and in the alternative for a new trial. But when confronted with the ruling of the Supreme Court in *United States* v. *Schaefer Brewing Co.*, 356 U. S. 227, 78 S. Ct. 674, 2 L. ed. 2d 721, respondents determined that prudence, diligence and safety dictated that the May 28 motion should be reiterated within ten (10) days after the July 23, 1962 order. Thus on July 30, 1962, the respondents combined the following statement with a motion to disallow interest, to-wit:

> "The defendants herein having previously, on May 28, 1963, filed a motion for a new trial subsequent to the docket entry of the Clerk pursuant to the verdict of the jury, these defendants not waiving any rights resulting from said filing of said motion but expressly relying thereon to the hearing, here and now reaffirm and reiterate said motion previously filed May 28, 1962, and incorporated it herein by reference as fully and completely as though the same were copied fully herein."
>
> (Append. 12b-13b)

Thereafter, on August 2, 1962, the petitioner filed a motion seeking to vacate the July 23rd order insofar as said order gave the defendants credit for sums paid to the mortgagees under the loss payable clauses of the policies. (Append. 23a-26a).

On October 8, 1962, the Court entered an order overruling the defendants' motion of July 30 insofar as it sought to disallow interest on the judgment from the time of the filing of suit and also overruling in its entirety the petitioner's motion to disallow credit for the mortgagee payments. This order of October 8, 1962, contained the following explicit recitations:

> "Within ten days after the Court's order of July 23, 1962, settling the judgment in this case, the remaining plaintiff, Helen Corinne Scales Trice, Executrix, and the remaining defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; Citizens Insurance Company of New Jersey; Queen Insurance Company of America; Home Insurance Company, and New Hampshire Fire Insurance Company moved the Court to amend the judgment further.
>
> "These motions and the same defendants' motion for judgment notwithstanding the verdict and for a new trial were heard September 17, 1962. Decision was reserved, pending filing of a transcript of the evidence, on the defendants' motion for judgment and for new trial but the other two motions have been argued and briefed and are now before the court for decision."
> (Append. 27a-29a)

On December 20, 1962, the Court entered a memorandum and order expressly sustaining the May 28, 1962, motion of respondents for both judgment notwithstanding the verdict and in the alternative for a new trial. In this order

the Court reserved for future disposition the counterclaims of respondents for the statutory bad faith penalty sought against the petitioner. (Append. 14b-15b).

On January 25, 1963, the Court entered its final order disposing of pending matters and within thirty (30) days thereafter the petitioner perfected appeal No. 15345, which was a valid appeal. (Append. 15b-16b).

Thus, as held by the trial Court and the Sixth Circuit Court of Appeals, there was no inconsistency in the procedure in this cause.

Petitioner's argument concerning its appeal No. 15285 is destroyed by its own terms. If the July 23, 1962, order was the final act of the Court disposing of all matters, including motion for judgment notwithstanding the verdict and motion for a new trial, etc., what action taken by the petitioner could have tolled the running of time for appeal under Rule 73(a)? According to the petitioner's reasoning, all motions having the effect of suspending appeal time had been filed subsequent to the May 25, 1962, docket entry, and were completely disposed of by the July 23, 1962, order. Upon what authority then can the petitioner assert that a motion filed by the petitioner subsequent to the July 23, 1962, order could have the effect of suspending the operation of the thirty (30) days appeal limitation of Rule 73(a)? Petitioner did not perfect his appeal until November 7, long after the thirty (30) days limitation for appeal from the July 23, 1962, order had expired. Under the petitioner's theory, the July 23rd order, being final and disposing of all previous motions suspending appeal time, then no motion filed by the petitioner after the July 23rd order would be effective to suspend his time for appeal, which would automatically have expired thirty (30) days after the July 23, 1962, order.

Yates v. *Behrend*, 280 F. 2d 64.

Stone v. *Hon. Wyoming Supreme Ct.*, 236 F.2d 275.
Marten v. *Hess*, 176 F. 2d 834.
Moore's Federal Practice, 2d Ed., Vol. 6, 3848.

Neither would Rule 60(b) render any assistance to the petitioner in this respect as such a motion does not toll the time for appeal.

Saenz v. *Kenedy*, 178 F. 2d 417.
Markert v. *Swift*, 173 F. 2d 517.
Sutherland v. *Fitzgerald*, 291 F. 2d 846.
Moore's Federal Practice, 2d Ed. Vol. 7, 331.

Thus, at every approach the petitioner's purported appeal, No. 15285, is void.

Questions No. 2 and No. 3 of the petition and the authorities cited in connection therewith (pages 16 through 21 of the petition) indicate a complete misconception of the applicable rules of law. Each of the cases cited supports an entirely different principle of law than that which is at issue in this cause.

Soler and Company v. *United Firemen's Insurance Co.*, 299 U. S. 45, 57 S. Ct. 54, 81 L. ed. 30, was a case involving a fire insurance policy and the defense of fraud. The jury returned a verdict for the plaintiff, which verdict was *approved by the trial Judge*. Plaintiff appealed and the First Circuit Court of Appeals reversed and dismissed the case saying:

> "It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss and we think the disparity of nearly $19,000.00 shows on its face and as a matter of law that the sworn proof of loss was fraudulent. . ."

The Supreme Court reversed the Court of Appeals on the grounds that there was conflicting evidence and, thus, a

jury question. Nowhere in the case did it appear that the discretionary action of a trial Court in granting a new trial was in issue. In the Soler case the trial Court was satisfied with the verdict and approved it. In the case at Bar the trial Court specifically disapproved the verdict and exercising its discretion granted a new trial.

In *Aetna Life Insurance Company of Hartford, Connecticut*, v. *Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371, the only question at issue was whether or not a verdict should have been directed. The Court held the evidence to be conflicting and, thus, to present a jury question. In this case, as in the Soler case, the trial Court approved the verdict of the jury and the question of the degree to which the discretionary action of the trial Court in granting a new trial is reviewable on appeal was in no way involved.

Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 232, 90 L. ed. 916, was an action under the Federal Employers' Liability Act. The jury returned a verdict for the plaintiff. The verdict was approved by the trial Court, but on appeal the Supreme Court of Missouri reversed and dismissed holding that there was no substantial evidence of negligence and, thus, no jury question. The Supreme Court of the United States reversed holding that a jury question was involved. Counsel for the petitioner, quoting from the Lavender case, stated:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an *appellate* court to weigh the conflicting evidence, judge the credibility of witnesses, and *arrive at a conclusion opposite from the one reached by the jury.*" (Emphasis added).

In the Lavender case likewise the trial Court had approved the jury verdict. No question was presented in regard to

the action of the trial Court in the discretionary granting of a new trial.

In *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. ed. 1615, the jury returned a verdict for the plaintiff under the Safety Appliance Acts.

> "At the close of the evidence, respondent moved for a *directed verdict.* The motion was not granted, and the jury returned a verdict for $5,000 in favor of the petitioner. The respondent then moved to have the verdict set aside *and to have judgment entered in its favor.* On December 28, 1945, this motion was granted and judgment was entered."

The Supreme Court reversed holding that the evidence conflicted to the point that a jury question was involved. This case again did not involve the action of the trial Court in granting a new trial, but only the action of the trial Court in directing a verdict.

Citing the foregoing cases and quoting excerpts therefrom, the petitioner states that they contained "applicable rules of law declared by this Court and how they were disregarded by the District Court". Respondents aver that these cases disclose excellent rules of law almost universally accepted in all jurisdictions, but that such rules simply have no application to the matter at Bar. All of these cases and the rule presented thereby refer to a situation where a trial or appellate Court has not only set aside a verdict of a jury, but has directed a verdict directly contrary to that rendered by the jury. In the case at Bar, as it now stands, the trial Court was simply dissatisfied with the verdict of the jury and with the conduct of counsel for plaintiff. It refused to allow the verdict to stand and ordered a new trial.

It is well to note at this point that all of the cases cited by the petitioner which arose under the Federal Employers

Liability Act are subject to an entirely different standard in regard to the question of negligence. In order to sustain an action under the Federal Employers Liability Act the degree of negligence necessary is minute.

> "We must be mindful that under this statute (FELA) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." (Emphasis added).
>
> *Rogers* v. *The Mo. Pacific Rwy. Co.,* 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443.
>
> *Zegan* v. *The Central R. R. Co., of New Jersey,* 266 F. 2d 101.

The rule in Federal Courts and in all other jurisdictions is well settled that:

> "The granting or refusing of a new trial is a matter resting in the sound discretion of the trial Judge and his action thereon is not reviewable upon appeal save in almost exceptional circumstances."
>
> *Aetna Casualty & Surety Co.* v. *Yeatts,* 4th Circuit, 122 F. 2d 350, 352-354.
>
> *Turner* v. *United States,* 229 F. 2d 944.

Thus, the authorities cited by the petitioner involve a directed verdict contrary to that reached by the jury, whereas the case at Bar involves not a termination of the case contrary to the jury verdict but the exercising by a trial Judge of his discretionary power to order a new trial.

Petitioner thereafter proceeds with a similar misconception of the law in expounding what she conceives to be applicable rules of law declared by this Court and how they were disregarded by the Court of Appeals. Petitioner thus cites *Hepburn* v. *Dubois,* 12 Pet. Reports, 345, 9 L. ed. 1111.

Again this case involved an adverse jury verdict which had been *approved* by the trial Court. The defendant sought on his appeal to have the jury verdict set aside and a verdict directed in his favor. The Supreme Court held that there was competent evidence to support the jury verdict and that same would not be disturbed. The case had nothing to do with the trial Court exercising its discretion and ordering a new trial.

In *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. ed. 520, plaintiff brought an action under the Federal Employers Liability Act. The jury returned a verdict for the plaintiff and the *District Court entered judgment accordingly.* On appeal by the defendant the Seventh Circuit Court of Appeals

> "Reversed this judgment after finding that, while there was evidence of negligence by respondent, there was no substantial proof that this negligence was the proximate cause of Tennant's death."
> 134 F. 2d 860.

It held that the District Court should have *directed a verdict in favor of the respondent or allowed its motion for judgment notwithstanding the verdict.* The Supreme Court reversed saying:

> "Upon examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for the respondent *notwithstanding the verdict* is to deprive petitioner of the right to a jury trial." (Emphasis added).

The case had nothing to do with review of an order granting a motion for a new trial.

Basham v. *Pa. R. R. Co.*, 372 U. S. 699, 83 S. Ct. 965, 10 L. ed. 2d 80, was another Federal Employers Liability

Act case wherein the jury rendered a verdict for the plaintiff. The trial Judge set aside the jury verdict and directed a verdict for the defendant on the ground that no negligence was established. The New York appellate division and Court of Appeals affirmed. The Supreme Court of the United States reversed holding that a jury question was presented, and that the New York Courts erred in setting aside the jury verdict and rendering judgment for the defendants. This case likewise had nothing to do with a trial Court exercising its discretion and granting a new trial.

The fallacy of the petitioner's argument on the aforementioned cases is the failure to distinguish between the law as applicable to a situation where a trial Court or appellate Court set aside a jury verdict *and directs a verdict for the opposite party*, and a situation wherein a trial Court disapproves the jury's verdict, sets it aside and *grants a new trial*. As to the former, the cases cited by the petitioner are applicable, and indeed the same principle was used by the Court of Appeals in the case at Bar wherein that Court reversed the action of the trial Court in granting judgment notwithstanding the verdict. In the latter situation, however, the cases relied upon by the petitioner are by their own terms inapplicable.

A motion for a new trial

> "is independent from the motion for judgment notwithstanding the verdict. It is governed by different principles. The motion for a new trial is addressed to the trial Judge's discretion and he should grant a new trial if he thinks the verdict is incorrect, or if for any reason the trial Judge is convinced that justice has not been done."
>
> *Johns* v. *Baltimore and Ohio R. R. Co.*, 143 F. Supplement 15, 23.

Even in the Federal Employers Liability Act it is noted that the granting or denial of a motion for a new trial is a subject discretionary with the trial Court and the exercise of discretion by the trial Court will not be disturbed on appeal. In *Zegan* v. *The Central R. R. Co. of N. J.*, 266 F. 2d 101, this very point was made. The trial Court granted a combined motion for judgment notwithstanding the verdict and in the alternative for a new trial. The Court of Appeals for the Third Circuit reversed the judgment notwithstanding the verdict but refused to interfere with the trial Court's granting of a motion for a new trial.

> "Twice recently we have refused to interfere with such an alternative grant of a new trial although we have reversed the accompanying judgment n. o. v. *Nenetti* v. *Evans Construction Co.*, 3rd Cir., 1958, 259 F. 2d 367; *Peters* v. *Smith*, 3rd Cir., 1955, 221 F. 2d 721. Whether in an extreme enough case there might be justification for a simultaneous reversal of both orders we need not decide. For in the circumstances of this case the ruling that the verdict was so contrary to the weight of the evidence that it could not justly stand was within the permissible exercise of judgment and discretion on the part of the trial judge.
>
> "We have recently had occasion to contrast the role of a trial judge in passing on a motion for judgment n. o. v. with his role in deciding a motion for a new trial. *Magee* v. *General Motors Corp.*, 3 Cir. 1954, 213 F. 2d 899. The one motion requires a judge to determine whether the evidence and justifiable inference most favorable to the prevailing party afford any rational basis for the verdict. The other requires that the trial judge evaluate all significant evidence, deciding in the exercise of his own best judgment whether the jury has so disregarded the clear weight of the credible evidence that a new trial is necessary to prevent injustice.

> "In this case, citing the Magee case, the trial judge made clear his understanding of the difference between these two functions. In addition the trial judge's analysis of the evidence indicated sufficient basis for his conclusion as to the weight of the evidence and his conviction that an unjust verdict had been rendered."
>
> *Zegan* v. *Central R. R. Co. of N. J.*, 266 F. 2d 101, 104.

If the trial Court in this cause had applied the standard asserted by the petitioner in Question No. 3 at pages 16 and 17 of the petition in ruling on the respondents' alternative motion for a new trial, such action would have been clearly reversible error. In *Williams* v. *Nichols*, 266 F. 2d 389, the trial Court followed exactly the procedure asserted by the petitioner in ruling on a motion for a new trial and the Court of Appeals for the Fourth Circuit reversed on the grounds that the application of such severe standard by the trial Court constituted error as a matter of law.

> "[4] However, the reluctance to disturb the action of a District Court upon a motion for a new trial for error of fact does not exist where the error is one of law; General American Life Ins. Co. v. Central Nat. Bank of Cleveland, supra; Youdan v. Majestic Hotel Management Corp., 7 Cir., 1942, 125 F. 2d 15. In other words, so long as the trial judge has committed no error of law in passing upon such a motion, his action will not normally be disturbed.
>
> Apparently the trial judge has, in this case, committed an error of law in that he has applied the wrong standard in his consideration and disposition of defendants' motion. The approach of the trial court is clearly shown by the following statement in his memorandum decision:

'The jury having found a verdict for the plaintiff, the Court, *in passing on the motion, must consider the evidence most favorable to the plaintiff and, considering the evidence in this light,* the Court is of the opinion that the defendant's motion should be denied.' (Emphasis supplied).

That the trial judge considered the evidence in the light most favorable to the plaintiff is disclosed by the recital, in the memorandum decision, of the facts pertinent to the nature, extent and duration of the plaintiff's injuries. Under the heading, 'Excessive Verdict', we find the following in the memorandum decision:

'The plaintiff was an able bodied, hard working man 53 years of age earning $1.60 per hour. Since the accident he had lost 8 to 10 pounds, is in constant pain, suffers constantly from severe headaches, is highly nervous and, although he is still working, he is unable to do his normal duties and *his doctor is of the opinion* that he should not be working at all. While he is only 53 years old, his physical condition has changed so that he is the equal of men 65 to 67 years old. As a result of his injuries, he suffered a whiplash, a moderate neck strain or pulling or straining of the muscles and ligaments, a lumbar sacro strain, and as a result of these injuries, a prior slight hypertension has been aggravated to a degree that *his doctor is of the opinion* he should be under medical care and observation for the rest of his life.' (Emphasis ours)

The foregoing statement was a summarization of the stated opinions and conclusions of the plaintiff's medical witnesses, particularly those of Dr. Bailey, and ignored completely the evidence of the defendants, i. e., the report of Dr. Jones.

The trial judge further stated:

'It can be assumed that juries are cognizant of the constantly diminishing value of the dollar,

and that they take this fact into consideration in arriving at a dollar value of one's injuries.'

[5] Clearly the District Court applied the standard applicable to consideration and disposition of a motion for a directed verdict or for a judgment n. o. v., rather than the one applicable to consideration and disposition of a motion to set aside the verdict and grant a new trial. As stated in the widely cited, quoted and followed case of Aetna Cas. & Sur. Co. v. Yeatts, supra [122 F. 2d 352],

> 'The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.'

The distinction between the governing standard in considering a motion to direct a verdict (or for a judgment n. o. v.) and that in considering a motion to grant a new trial was clearly stated in the case of Felton v. Spiro, 6 Cir., 1897, 78 F. 576, 582, and quoted with approval in General American Life Ins. Co. v. Central Nat. Bank of Cleveland, supra, 136 F. 2d at page 823, as follows:

> '* * *, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's.

> It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs.'

In passing upon the motion for a new trial and in considering the evidence in the light most favorable to the plaintiff, the trial court applied the standard applicable to a motion for a directed verdict or judgment n. o. v., rather than exercising his own independent judgment after a weighing of *all* the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice. See the discussion by Judge Sobeloff concerning this distinction in McCracken v. Richmond, F. & P. R. Co., 4 Cir., 1957, 240 F. 2d 484, 488. See also Snead v. New York Cent. R. Co., 4 Cir., 1954, 216 F. 2d 169; Hawkins v. Sims, 4 Cir., 1943, 137 F. 2d 66; Roedegir v. Phillips, 4 Cir., 1936, 85 F. 2d 995; Garrison v. United States, 4 Cir., 1932, 62 F. 2d 41. As was held in the case of Magee v. General Motors Corp., 3 Cir., 1954, 213 F. 2d 899, the application of the wrong standard in the disposition of the motion for a new trial amounted to an abdication of the judge's function with respect to that motion.

The case is accordingly remanded for reconsideration of the motion to set aside the verdict and for a new trial, not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the *trial court* of the weight of all the evidence, considering also any other relevant factors."

The case at Bar is directly in line with and governed by the undisputed rule laid down in *Turner* v. *United States*, 229 F. 2d 944. That case originating in the Federal District Court for the Eastern District of Tennessee involved a suit between the wife and the mother of a deceased war veteran to determine who was the beneficiary

of certain government insurance. The case was tried before a jury which returned a verdict in favor of the mother. The trial Court set aside the verdict and granted a new trial. On appeal the Sixth Circuit Court of Appeals affirmed.

> "The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion. *Washington Times Company* v. *Bonner,* 66 App. D. C. 280, 86 F. 2d 836, 848, 110 A.L.R. 393; *Kansas City Stockyards Company of Maine* v. *Anderson,* 8 Cir., 199 F. 2d 91, 95, 36 A.L.R. 2d 1; *Spero-Nelson* v. *Brown,* 6 Cir., 175 F. 2d 86, 89; *United States* v. *Johnson,* 327 U. S. 106, 112-113, 66 S. Ct. 464, 90 L. ed. 562. It was held in the Spero-Nelson case that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save in the most exceptional circumstances. *Aetna Casualty & Surety Co.* v. *Yeatts,* 4 Cir., 122 F. 2d 350-354. We therefore are concerned only as to whether the District Court clearly abused its discretion in granting the new trial. *Cf. Hill* v. *Pennsylvania Greyhound Lines, Inc.,* 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order. *Cicrich* v. *State Industrial Accident Commission,* 143 Or. 627, 635, 636, 23 P. 2d 534. . . .

"As declared by the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Yeatts,* supra, 122 F. 2d at page 352, Judge Parker writing the opinion:

'It is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice. . . .' "

Any technical argument concerning the insufficiency of the respondents' motion of May 28, 1962, which was characterized by the trial Court as containing "every combination of words known to the form books", is without merit. Patently, same was clearly sufficient both as to the weight of the evidence and as to highly prejudicial misconduct of the petitioner's counsel. This motion abundantly meets the test that:

"Thus, it is readily discernible that the language of the motion and subsequent order need not be identical but only reasonably synonymic to be responsive. See also *General Motors Corp.* v. *Perry,* 303 F. 2d 544 (7th Cir. 1962) and *Cooper* v. *Midwest Feed Products Co.,* 271 F. 2d 177 (8th Cir. 1959)."

Lack Industries, Inc., v. *Ralston Purina Co.,* 327 F. 2d 266 (1964).

Lebeck v. *William A. Jarvis, Inc.,* 250 F. 2d 285.

General Motors Corp. v. *Perry,* 303 F. 2d 544 (1962).

In the case at Bar the trial Judge exercised his discretion, granted a new trial because:

1. The verdict was against the overwhelming weight of the evidence on the issue of fraud, false swearing, willful concealment and misrepresentation.

2. The verdict was against the overwhelming weight of the evidence on the issue of the felonious burning of the warehouse.

3. Of the persistent misconduct of counsel representing the plaintiff.

This discretionary action of the trial Court is not reviewable except for manifest abuse of discretion which is clearly not present in the case at Bar.

CONCLUSION

Petitioner's testator was the insured under various policies of insurance issued on a grain warehouse. He filed a proof of loss. Respondents investigated and determined not to pay the claim because in their judgment the insured was guilty of fraud, false swearing, willful concealment, misrepresentation and arson. The case was tried. The jury found the insured guilty of fraud, false swearing, willful concealment and misrepresentation as to the policies insuring the contents of the mill. The same jury returned a verdict in favor of the petitioner on the policies insuring buildings and machinery. Respondents moved for judgment notwithstanding the verdict and for a new trial. The trial Court granted both motions. One of the primary reasons for granting the motion for judgment notwithstanding the verdict as to building and machinery items rested in the fact that the petitioner admitted on the trial of the cause that the principal grain storage facility described in the proof of loss was in reality less than one-third the size set forth in the proof of loss. (Append. 32b, 39b-40b, 60b). In the absence of this inflated grain bin the proof showed without question that the grain storage facilities of the mill to their utmost

capacity could not hold anywhere near the amount of grain which the proof of loss indicated to have been located in the mill. (Pl. Ex. 2, Append. 33b-36b). As to the motion for a new trial, the Court was convinced:

1. That the verdict was against the overwhelming weight of the evidence on both arson and fraud.

2. That the persistent misconduct of the petitioner's counsel required a new trial.

The petitioner appealed and the United States Circuit Court of Appeals for the Sixth Circuit set aside the judgment notwithstanding the verdict and sustained the motion granting a new trial. The petitioner asked for a rehearing, which was denied, and then filed this petition. At the end of its petition, the petitioner states that the judgment of the Court of Appeals is in conflict with:

"(a) Applicable decisions of this Court;"

WHAT DECISIONS?

It further says:

"(b) That it has decided an important question arising under the Rules of Civil Procedure adopted by this Court to govern the practice in the District Court which has not been, but should be settled by this Court;"

WHAT QUESTION?

It further says:

"(c) That it has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision."

WHAT DEPARTURE?

Respondents aver that the application for a writ of certiorari should be denied.

Respectfully submitted,

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